

and his co-deponent attended the funeral. They saw the dead body of the deceased being bathed and wrapped in white cloth according to Hindu rites.

It seems to me that such an application for leave to swear the death of a person on an application for Probate or Letters of Administration to his estate would be appropriate in cases where the applicant is unable to swear in his oath to the death of the deceased and there is no direct evidence of his death, but only evidence from which his death may be presumed to have taken place, e.g. from his disappearance at or after a given time and from the circumstances attending such disappearance or from his not having been heard of for a prolonged period by those with whom he might reasonably have been expected to communicate. (See *Tristram and Coote's Probate Practice*, 21st edition, page 522). In such cases the fact of death is not certain, but there are only the circumstances from which it may be presumed. Where, however, the fact of death is not in doubt, and the applicant can swear that death had occurred, no order is required on any application for Probate or Grant of Letters of Administration to swear that death had taken place. (See *In the Estate of Cecilia Long-Sutton* ⁽¹⁾). In that case a lady, one Cecilia Long-Sutton, had disappeared on 23rd December, 1909, and her dead body was recovered from a river on the 29th of the same month. A sister of the deceased, an executrix under her will, applied for an order giving leave to swear the death of the said Cecilia Long-Sutton as having occurred between 23rd and 29th December, 1909. No order was made on her application, the President, Sir Samuel Evans, observing:—

"In this case the grant could have been obtained in the registry on swearing that the deceased is dead, and that she died between December 23 and 29, 1909. I think, in strictness, that the oath should be that the deceased died on December 23 or 29, 1909, or on some day between those dates. I make no order on this application."

It is clear from the affidavits in this case that not only is the fact of death not in doubt, but even the actual date of death is known. Therefore, all that the applicant need do is to swear on his application for Probate or Letters of Administration or distribution (in the case of a small estate) in respect of the estate of the deceased that he died on the 17th day of February, 1950.

I therefore made no order on the application.

No order made.

A MOHAMED EKRAM v. PUBLIC PROSECUTOR

[A. Cr. J. (Ismail Khan J.) November 17, 1961]

[Raub — Criminal Appeal No. 10 of 1961]

Criminal Procedure — Adjournment — Illness of counsel — Refusal to adjourn trial on the ground that "there had been many postponements already."

B In this appeal it was urged on behalf of the appellant that he had retained counsel to defend him in a private summons but on the day of the trial his counsel was ill. Two days before the trial his counsel had sent a letter along with a medical certificate to the learned Magistrate and counsel for the respondent had also been informed. The Magistrate, however, refused an application for an adjournment at the trial on the ground that "there had been many postponements already." There had been several adjournments before counsel were engaged but there is nothing in the record to indicate at whose request they were made. Since counsel were engaged there had also been several adjournments until the case was finally fixed for hearing.

C Held: a postponement is not automatic following the production of a medical certificate to account for absence of counsel. Each case should be considered on its merits. In the circumstances of this case, appeal would be allowed. Re-trial ordered.

CRIMINAL APPEAL.

Dato R. P. S. Rajasooria for the appellant.

Sheikh Abdul Rahman (Deputy Public Prosecutor) for the respondent.

E **Ismail Khan J.:** The appellant was charged at the Magistrate's Court, Kuala Lipis, with assaulting one Haji Mohd. Sidek bin Haji Salimullah, an offence under section 352 of the Penal Code. He was tried on 5th July, 1961, and convicted and sentenced to pay a fine of \$75 in default one month's imprisonment. This appeal is against both conviction and sentence.

F Among other grounds of appeal, it was urged on behalf of the appellant that he had retained counsel to defend him but on the day of the trial his counsel was ill. On 3rd July, 1961, counsel had sent a letter along with a medical certificate to the learned Magistrate. Counsel for the respondent had also been informed. A telegram was also sent on 4th July, 1961, to the President, Sessions Court, Raub, who was also the Magistrate in the case. The Magistrate, however, refused an application for an adjournment at the trial on the ground that "there had been many postponements already." It would appear from the record that both parties engaged counsel only in October 1960. There had been several adjournments before counsel appeared on the scene but there is nothing in the record to indicate at whose request these adjournments were applied for. Since counsel were engaged there had been several adjournments until the case was finally fixed for 5th July, 1961.

H On 5th July, 1961, counsel for the respondent was agreeable to an adjournment provided his expenses were paid which the appellant was

however not in a position to meet. An application for an adjournment was therefore refused.

In this case it is true there is nothing in the record to show at whose instance the several adjournments were made before counsel were retained. It may have been at the request of the respondent.

In considering the circumstances of this case I therefore allowed the appeal and ordered a retrial before another Magistrate.

I do not however intend this to be regarded as a precedent or to give the impression that an application for an adjournment should automatically follow the production of a medical certificate from counsel. Each case should be considered on its merits.

Appeal allowed.

Re RADHA KRISHNA NAIDU

[R. Cr. J. (Hepworth J.) November 24, 1961]

[Penang — Criminal Revision No. 7 of 1961]

Criminal Procedure — Appeal against acquittal — Private summons — Criminal Procedure Code (Cap. 21), ss. 300 and 302.

Criminal Procedure — Revision — Exercise of revisional power — Criminal Procedure Code (Cap. 21), s. 322

In a private summons, the learned Magistrate, after hearing the evidence of the complainant and his witnesses, dismissed the case and acquitted the accused without calling upon him for his defence, and without hearing submissions by counsel for either party. Counsel for the complainant tried to file a notice of appeal but it was rejected by the Magistrate's Court by virtue of section 300 of the Criminal Procedure Code because the appeal had not been preferred by the Public Prosecutor. Counsel then made a written submission to the Magistrate that section 302 of the Code gives the complainant the right to appeal as a private summons does not need the sanction of the Deputy Public Prosecutor. This was also rejected on the ground that section 300 is a specific section and section 302 is a general section and section 302 cannot be read in isolation from section 300.

The question was then submitted to the High Court with a view to its acting in revision.

Held: section 300 can be read together with section 302 without doing violence to the language of either. Section 300 means exactly what it says, that is that when an accused person has been acquitted by a Sessions or Magistrates' Court there shall be no appeal except by the Public Prosecutor; and section 302 makes it incumbent upon the Public Prosecutor if he is minded to appeal in such circumstances to lodge his notice of appeal within 10 days from the time of the order of acquittal and otherwise comply with the provisions of that section.

Passage in *Mallal's Criminal Procedure*, 4th Edn., p. 452 adopted.

Observations on the exercise of revisional powers by the High Court.

Cases referred to:—

(1) *Mandal v. Mandal*, I.L.R. 44 Cal. 703.

(2) *Rai v. Dass*, I.L.R. 5 Pat. 25.

CRIMINAL REVISION.

Revision made in Chambers, parties not present.

A Hepworth J.: In Private Summons Case No. P(2) 3328 of 1961 in the Second Magistrate's Court, Penang, the learned Magistrate, after hearing the evidence of the complainant and his witnesses, dismissed the case and acquitted the accused without calling upon him for his defence and without hearing submissions by counsel for either party. Counsel for the complainant tried to file a Notice of Appeal but the Notice was rejected by the Magistrate's Court by virtue of the provisions of section 300 of the Criminal Procedure Code because the appeal had not been preferred by the Public Prosecutor.

B Counsel for the complainant then made a submission to the Magistrate in writing that section 302 of the Criminal Procedure Code gives the complainant the right to appeal as a private summons does not need the sanction of the learned Deputy Public Prosecutor. The learned Magistrate rejected this submission on the ground that section 300 is a specific section and section 302 is a general section and section 302 cannot be read in isolation from section 300. The matter was also referred to the learned Deputy Public Prosecutor who agreed with the views of the learned Magistrate.

C The question has now been submitted to me with a view to my acting in revision.

D I must preface my remarks by saying that the Deputy Public Prosecutor has not at any time been invited to file a notice of appeal in this case.

E Counsel for the complainant argues that as the Criminal Procedure Code (Amendment) Ordinance, 1938, deleted the words "or 299 or 300" in sub-section (1) of section 302, section 302 is no longer subject to section 300.

F Prior to the coming into force of the Criminal Procedure Code (Amendment) Ordinance, 1938, there was a sub-section (2) to section 300 which required the petition of appeal against an acquittal to be lodged within 14 days from the date of judgment. By deleting sub-section (2) and leaving sub-section (1) of section 300 as it was (except for the deletion of the "(1)") and deleting the words and figures "or 299 or 300" in sub-section (1) of section 302 an appeal against an acquittal became subject to the ordinary procedure for appeal provided by sub-section (1) of section 302, that is to say the lodging of a notice of appeal within 10 days from the time of the judgment. It also had the effect of applying the ordinary procedure to appeals under section 299 for which no procedure was previously provided. But these amendments in no way affected sub-section (1) of section 300 except that it ceased to be sub-section (1) and became simply section 300.

G To give section 302 the meaning urged by the petitioner would be to render section 300 redundant because the Public Prosecutor, when a party, could appeal against an acquittal under the provisions of section 302. Section 300 can be read together with section 302 without doing